80-682

No. ——

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

United States Court of Appeals
For the Sixth Circuit No. 79-5222

RICHARD E. TAPERT, D.O.,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether 42 United States Code 1396h prior to its amendment in 1977 proscribed payments received by physicians in return for referring their laboratory work to a specific laboratory where all payments received by the laboratory from the Government under the Medicaid Program were properly billed for and obtained?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Richard E. Tapert, D.O., by his attorney, Michael H. Golob, respectfully prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit on June 16, 1980 and the Order Denying the Petition for Rehearing *En Banc* and Rehearing entered on August 19, 1980.

OPINIONS BELOW

The Judgment and Commitment of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported, but is set forth in Appendix A herein.

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 625 F2d 111 (6th Cir. 1980), and is set forth as Appendix B herein.

The Order of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing *En Banc* and Rehearing is unreported, but is set forth in Appendix C herein.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 16, 1980; Petition for Rehearing *En Banc* and Rehearing was timely filed and was denied on August 19, 1980. The jurisdiction of the Court is invoked under Title 28, United States Code 1254(1).

STATUTE INVOLVED

42 United States Code 1396h.

SUMMARY OF THE CASE

Petitioner, Richard E. Tapert, D.O., a licensed physician, was indicted on September 21, 1978 along with four (4) other physicians and seven (7) other defendants. On February 2, 1979, a follow-up

Information was filed charging Doctor Tapert with violations of 42 United States Code 1396h(b)(1) (1972), for the receipt of kickback payments in return for sending his laboratory work to Titan Laboratory.

On March 16, 1979, the United States District Court Judge denied the Motion to Dismiss all of the charges. On March 21, 1979, the United States Court of Appeals for the Fifth Circuit issued its Opinion in *United States v. Porter*, 591 F2d 1048 (5th. Cir. 1979) which directly pertained to the instant cause. The defendants orally moved the Court for rehearing which prompted the Trial Court to issue a written opinion denying the defendants' Motion for Rehearing which has been published as *United States v. Weingarden*, 468 F. Supp. 410 (E.D. Mich. 1979).

On April 10, 1979, Doctor Tapert entered a plea of guilty to the Counts of the Amended follow-up Information pertaining to him. A timely motion in arrest of Judgment was filed and denied by the Trial Court.

On June 8, 1979, the Judgment and Commitment of the Trial Court, reproduced as Appendix A herein, entered a total fine of $25,000.00 and provided that Doctor Tapert should serve twenty (20) days under a work release program.

A timely Notice of Appeal was filed with the Sixth Circuit and the Sixth Circuit issued an opinion affirming the conviction on June 16, 1980, said opinion being reproduced in Appendix B herein. Pursuant to a timely Motion for Rehearing and Rehearing *En Banc*, the Sixth Circuit denied said petitions on August 19, 1980, with said Order Denying Rehearing *En Banc* and Rehearing being reproduced in Appendix C herein.

STATEMENT OF THE CASE

The Amended follow-up Information against Doctor Tapert alleged that he had received monetary payments from a medical laboratory in exchange for referring his laboratory work to the laboratory. The Amended follow-up Information further provided that the claims filed by the laboratory were in accordance with Medicaid statutes and regulations and therefore, the moneys received by the laboratory were those to which the laboratory was lawfully entitled. In its entirety, the Amended follow-up Information against Doctor Tapert is being reproduced herein as follows:

> " 'Counts Twenty-Seven Through Thirty-Five
>
> " 'On or about the dates listed below, in the Eastern District of Michigan, Richard Tapert, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part of the federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully [sic] solicit and receive kickback payments from Titan Laboratories, Inc., and Associates Physicians Services Co., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.
>
> " 'To wit, Richard Tapert, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely Associated Physicians Services Company, in exchange for referring his laboratory work to Titan

Laboratories, Inc. The claims filed by Titan Laboratories, Inc., were in accordance with Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, was asked for payment for specific blood work was in accordance with Medicaid statutes and regulations.

" 'Count	Approximate Date of Payment	Amount of Money	Source of Payment
27	June 24, 1975	$200	Associated Physicians Services, Co.
28	August 12, 1975	$200	Associated Physicians Services, Co.
29	September 19, 1975	$500	Associated Physicians Services, Co.
30	October 17, 1975	$200	Associated Physicians Services, Co.
31	December 10, 1975	$200	Associated Physicians Services, Co.
32	February 17, 1976	$400	Associated Physicians Services, Co.
33	May 26, 1976	$400	Associated Physicians Services, Co.
34	June 30, 1976	$200	Associated Physicians Services, Co.
35	July 26, 1976	$400	Associated Physicians Services, Co.

" 'All in violation of Title 42, U.S.C., Section 1396h(b)(1).'
(Amended Follow Up Information, pages 4-5; App. 419)"

On April 10, 1979, Doctor Tapert pled guilty to five counts of the Amended follow-up Information. Following the Trial Court's denial of his timely Motion for Arrest of Judgment, Doctor Tapert filed a timely Claim of Appeal in the United States Court of Appeals for the Sixth Circuit on the issue as to whether the Amended follow-up Information charged an offense pursuant to 42 United States Code 1396h. Contrary to the decision of the United States Court of Appeals for the Fifth Circuit in *United States v. Porter*, 591 F.2d 1048

(5th Cir. 1979), the Sixth Circuit rejected Doctor Tapert's argument that the Amended follow-up Information did not charge an offense.

The Sixth Circuit further specifically declined to follow the decision of the Fifth Circuit in the *Porter* matter, thus expressly creating a conflict among the various Courts of Appeal. In other words, both the Sixth Circuit and the Government would concede that if the law of the Fifth Circuit in *Porter* were applied in the Sixth Circuit, Doctor Tapert would be guilty of no federal criminal offense.

REASON FOR ALLOWANCE OF THE WRIT

ARGUMENT

I.

THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN CONSTRUING 42 UNITED STATES CODE 1396h IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WHICH NOW REQUIRES THIS HONORABLE COURT TO RESOLVE THE CONFLICT WHICH HAS ARISEN IN THE CIRCUIT COURTS OF APPEAL ON THIS IMPORTANT QUESTION OF FEDERAL STATUTORY CONSTRUCTION

The Court of Appeals for the Sixth Circuit, in construing 42 United States Code 1396h, has rendered a decision in conflict with a decision of the United States Court of Appeals for the Fifth Circuit on an important matter of Federal statutory construction.

In essence, the United States Court of Appeals for the Fifth Circuit in *United States v. Porter, supra,* has narrowly construed the term "bribe or kickback" which is a necessary element under 42 United States Code

1396h. In *Porter, supra*, the Fifth Circuit reasoned that because the statute was materially amended in 1977 because of difficulty in application, it would not be constitutionally permissible to safely apply the prior statute, at issue in the present case, to conduct occurring prior to the amendment of the statute.

> ". . . If the meaning of the 1972 version of 42 U.S.C. § 1395nn(b) was not clear and precise to the Congress and to United States Attorneys charged with enforcing the law, then we are hard put to say, with that degree of confidence required in a criminal conviction, that these defendants were given clear warning by that statute that their conduct was prohibited by it, thus amounting to a criminal act." *United States v. Porter, supra*, at 1054.

In its Opinion, the Sixth Circuit expressly rejected the *Porter* decision, thus creating a conflict among the Circuits on an important matter of Federal statutory construction. The Sixth Circuit has opted for a much broader definition of the terms of our "bribe, kickback or rebate" found in the statute, in opposition to all existing Federal law which mandates narrow constructions of penal statutes.

Given this conflict in the Circuits on this important issue of Federal statutory construction, it is respectfully urged that this most Honorable Court grant this Petition for a Writ of Certiorari to resolve this important question. The issue of whether a physician has committed a criminal act by referring blood analysis work to a specific laboratory should not depend upon whether the physician lives in the midwest as contrasted to the southeastern portion of the United States.

CONCLUSION

For the foregoing reasons, Petitioner, Richard E. Tapert, D.O., respectfully urges that this Petition for Writ of Certiorari be granted to resolve the conflict which has arisen among the Circuits.

Respectfully submitted,

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Dated: October 6, 1980

APPENDIX "A"

JUDGMENT AND COMMITMENT ORDER

(United States District Court
Eastern District of Michigan)

United States of America vs.

DEFENDANT: RICHARD TAPERT, D.O. Docket No. 79-80091-04

In the presence of the attorney for the government the defendant appeared in person on this date: 6-08-79

COUNSEL: XX WITH COUNSEL Michael Golob

PLEA: XX GUILTY, and the court being satisfied that there is a factual basis for the plea,

FINDING & JUDGMENT: Defendant has been convicted as charged of the offense(s) of Counts 27 thru 31, Medicaid Kickbacks, in violation of Title 42, Section 1396 (h) (b) (1), U. S. Code.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty (20) days under a work release program.

SENTENCE OR PROBATION ORDER: IT IS ORDERED that defendant pay a FINE in the amount of five thousand dollars ($5,000.00) on each of 5 Counts for a total of twenty-five thousand dollars ($25,000.00)

SPECIAL CONDITIONS OF PROBATION, IT IS ORDERED that Counts 32, 33, 34 & 35 of the Information be DISMISSED.

IT IS FURTHER ORDERED that defendant's bond be continued pending appeal.

ADDITIONAL CONDITIONS OF PROBATION, In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION: The court orders commitment to the custody of the Attorney General and recommends,

/s/ Cornelia G. Kennedy

Date 6/11/79

APPENDIX "B"

OPINION

Nos. 79-5222-24, 79-5269-70

(United States Court of Appeals
For the Sixth Circuit)

Decided and Filed June 16, 1980

United States of America, Plaintiff-Appellee, v. Richard Tapert, Harvey Golden, Gerald Weingarden, Donald Freedlander and Robert Gash, Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Michigan.

Before: Weick and Jones, Circuit Judges, and Phillips, Senior Circuit Judge.

Phillips, Senior Circuit Judge, delivered the opinion of the Court, in which Weick, Circuit Judge, joined. Jones, (pp. 18-20) filed a separate concurring opinion.

Phillips, Senior Circuit Judge. These are consolidated appeals by five Detroit osteopathic physicians who were convicted of receiving kickbacks for sending urine and blood samples of their patients to Titan Laboratories (Titan) for analysis. All five of the physicians were enrolled in the Medicare and Medicaid programs and the charges for the laboratory analysis were paid to Titan out of Medicare and Medicaid funds. The district court held that the payments violated the original version of 42 U.S.C. § 1936h(b),[1] which was in

---

1 (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this

(cont'd. on following page)

effect during the years involved in this case. In 1977 Congress amended the statute so as to remove any possible doubt that conduct such as that involved in the present case violates the Act.[2]

(cont'd. from preceding page)

> title [42 USCS §§ 1396-1396d, 1396f-1396i] and who solicits, offers, or receives any —
>
> (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or
>
> (2) rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services
>
> shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

[2] The amended § 1396h(b)(1) is as follows:

> (b)(1) Whoever solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind —
>
> (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or
>
> (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter.
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.
>
> (2) Whoever offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person —
>
> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter,
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(cont'd. on following page)

The principal issues on this appeal are whether the information under which appellants were convicted charges a violation of the pre-1977 version of 42 U.S.C. § 1396h(b)(1) (note one), and whether the statute is unconstitutional for vagueness. Then Chief District Judge Cornelia Kennedy, now a judge of this court, ruled that the payments to the doctors were kickbacks, that the information charges a violation of the statute and that the statute is not invalid for vagueness. We affirm.

I

Apparently Titan initiated the arrangement for the kickbacks, by having its representative contact one of the physicians.[3] In return for payments from Titan or one of its affiliates, the physician agreed to send his patients' specimens to Titan and to encourage his colleagues to do the same. Other physicians entered into similar agreements, which Titan described as "consulting" arrangements. This pattern of activity began in April 1974 and continued until January 1978.

(cont'd. from preceding page)

(3) Paragraphs (1) and (2) shall not apply to —

(A) a discount or other reduction in price obtained by a provider of services or other entity under this subchapter if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under this subchapter; and

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services.

[3] *See United States* v. *Shermetaro*, — F.2d — (No. 79-5148, 6th Cir. 1980), in which this court affirmed the conviction of one of the parties to this scheme under 18 U.S.C. § 371 for conspiracy to defraud the United States by obstructing the collection of income taxes from Titan Laboratories.

Beginning in 1976, the physicians began depositing their Titan checks in an escrow fund for the purpose of acquiring an interest in Titan. The fund was administered by J.K.F. Inc., a corporation set up by the physicians to hold the Titan stock they proposed to buy. When the escrow fund reached $60,000, the physicians contributed an additional $15,000 and J.K.F. Inc. acquired a 40 percent interest in Titan.

On September 21, 1978, a federal grand jury returned a 37 count indictment against appellants, five other individuals and three Michigan corporations. On February 2, 1979, the Government filed a 42 count follow-up information charging appellants with soliciting and receiving Medicare and Medicaid kickbacks from Titan and associated entities. The information thereafter was amended. The version under which appellants were convicted is referred to in the record as the Amended Follow-Up Information.

Judge Kennedy denied the motions of appellants to dismiss the indictments. Thereafter, in a published opinion, she denied their motions for a rehearing. *United States* v. *Weingarden*, 468 F. Supp. 410 (E.D. Mich. 1979). In this opinion Judge Kennedy held that the pre-1977 version of 42 U.S.C. § 1396h(b)(1) prohibited the conduct charged in the information, and that the challenged statute was sufficiently clear to give to appellants adequate notice that their alleged conduct was illegal.

Thereafter, under a plea bargaining agreement, each of the appellants entered a plea of guilty to certain counts of the information applicable to him. The Government approved dismissal of the indictment.

II

Prior to their guilty pleas, the appellants gave notice that they intended to appeal the ruling of the district court on the applicability of § 1396h(b)(1). To preserve the issue for appeal they moved for arrest of judgment under Fed. R. Crim. P. 34 on the ground that the statute did not apply to their conduct and the district court, therefore, had no jurisdiction to accept their guilty pleas. This is the procedure approved by this court in *United States* v. *Heller*, 579 F.2d 990, 992-93, and n. 1 (6th Cir. 1978). *See also North Carolina* v. *Alford*, 400 U.S. 25, 37-38 (1970): *United States* v. *Cox*, 464 F.2d 927, 941 (6th Cir. 1972). The Government concedes that the alleged defects raised by appellants are jurisdictional and not waived by their guilty pleas. Consequently the legal issue is properly before this court.

III

Dr. Gerald Weingarden entered a plea of guilty to Counts three through seven of the amended follow-up information, which are as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Gerald Weingarden, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and willfully solicit and receive kickback payments from Titan Laboratories, Inc., Spartan Laboratories, Inc., and M.A. Delaney, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, the Government contends Gerald Weingarden, received monetary payments labelled "consulting fees" from an entity related to Titan Laboratories, Inc., namely Spartan Laboratories, Inc., principally to induce the defendant to send his laboratory work to Titan. In addition, it was agreed that the defendant would perform the following services: (1) to form and assist in the formation of J.K.F., Inc., as described in indictment Number 78-80689, and (2) to encourage other doctors to send their laboratory work to Titan, as described in Indictment Number 78-80689.

Gerald Weingarden visited Titan Laboratories, Inc., from time to time, in connection with the performance of the above-described services.

The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
3	October 27, 1976	$1,000	Spartan Laboratories, Inc.
4	November 22, 1976	$1,000	Spartan Laboratories, Inc.
5	December 28, 1976	$1,000	Spartan Laboratories, Inc.
6	March 1, 1977	$1,000	Spartan Laboratories, Inc.
7	March 1, 1977	$1,000	Spartan Laboratories, Inc.

> All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Weingarden admitted that he had committed the acts charged in the information.

Dr. Harvey Golden entered a plea of guilty to counts 11 through 15 of the Information, which charged as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Harvey Golden, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and willfully solicit and receive kickback payments from Titan Laboratories, Inc., and Media Technology, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.
>
> To wit, Harvey O. Golden D.O., received monetary payments from Titan Laboratories, Inc., in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., were entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, the blood work had been done, and that

the billing for that blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
11	May 27, 1974	$850	Titan Laboratories, Inc.
12	August 8, 1974	$900	Media Technology, Inc.
13	September 3, 1974	$1,500	Titan Laboratories, Inc.
14	October 24, 1974	$1,000	Titan Laboratories, Inc.
15	December 6, 1974	$1,500	Titan Laboratories, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Golden testified as follows:

The Court: Knowing those things, how do you wish to plead at this time to Counts 11, 12, 13, 14, 15?

Defendant Golden: Guilty, your Honor.

The Court: Will you tell me in your own words what it is that you did do that causes you to plead guilty?

Defendant Golden: Part of my motives I stated, perhaps an equal amount of my motives were for the inducement of monetary gain.

The Court: In other words, to receive payment from Titan for sending work to Titan?

Defendant Golden: Yes.

The Court: And some of that work at least was Medicare and Medicaid work?

Defendant Golden: Yes, your Honor.

The Court: Would that be true for all of the periods involved here, May 27, 1974, through December 6, 1974?

Defendant Golden: Yes, your Honor.

Dr. Donald Freedlander entered a plea of guilty to counts 17 through 21 of the Information, which charged as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Donald Freedlander, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully [sic] solicit and receive kickback payments from Titan Laboratories, Inc., and M.A. Delaney, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.
>
> To wit, the Government contends Donald Freedlander, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely M.A. Delaney, Inc., principally to induce Donald Freedlander, D.O., to send his laboratory work to Titan Laboratories, Inc. In addition, it was agreed that Donald Freedlander would perform the following services:
>
> (1) to form and assist in the formation of J.K.F., Inc., as described in Indictment Number 78-80689, and (2) to encourage other doctors to send their laboratory work to Titan Laboratories, Inc., as described in Indictment Number 78-80689.
>
> The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and

regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., were entitled.

That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
17	August 23, 1976	$200	M.A. Delaney, Inc.
18	August 23, 1976	$200	M.A. Delaney, Inc.
19	September 7, 1976	$200	M.A. Delaney, Inc.
20	September 10, 1976	$200	M.A. Delaney, Inc.
21	September 15, 1976	$200	M.A. Delaney, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Freedlander testified as follows:

The Court: Will you tell me what it was that you did on or about the dates mentioned that causes you to plead guilty? What did you do on or about August 23rd, 1976, with regard to these checks apparently from M.A. Delaney, Inc.?

Defendant Freedlander: These checks were received by me, yes, your Honor, they were received by me.

The Court: You received the checks described in Counts 17, 18, 19, 20, 21?

Defendant Freedlander: Yes, I did, your Honor.

The Court: From M.A. Delaney?

Defendant Freedlander: Yes, I did.

The Court: And did you have some relationship at least with Titan Laboratories as stated in the information?

Defendant Freedlander: Yes, I did, your Honor.

The Court: And did that include some kind of business involving Medicare and Medicaid?

Defendant Freedlander: Right.

The Court: In other words, this was business with Titan Laboratories that included some business relating to Medicare and Medicaid samples?

Defendant Freedlander: Yes, your Honor.

The Court: Did you receive these payments for sending work to Titan Laboratories?

Defendant Freedlander: Yes, I did, your Honor.

The Court: Did you perform any services for these companies, M.A. Delaney and Titan Lab?

Defendant Freedlander: Yes, I did, your Honor, I helped with the formation and was of assistance to the J.K.F. Corporation.

* * *

The Court: You have said something about, among other things, and that was kind of confusing to me, except for setting up J.K.F. Corporation, did you provide any other services to Titan Laboratories?

Defendant Freedlander: Yes, among other things, I encouraged other physicians to send their work to the laboratory.

The Court: In other words, there may not be a factual basis for this plea other than the

statement that you in fact performed services besides sending business to Titan Lab?

Mr. Fink: I think under the general intent statute, I don't think there has to be a dominant purpose, your Honor. He has indicated that that was one of the things he received consideration for.

The Court: As long as it is clear, and I am not so sure it is clear from the statement, was one of the reasons that you received these payments from Titan Lab, or from M.A. Delaney, Inc., because you were sending your lab business to Titan Laboratories, was that one of the reasons?

Defendant Freedlander: In the total, yes, it was. It was part of it. It was one of the reasons.

* * *

The Court: In view of the fact it uses the word wilfully [sic] and that there were other considerations, I think we should at least really know what he does wish to plead guilty. I have a little problem with the factual basis under his statement. Maybe I can ask him this question.

Was the referral of business to Titan Laboratories a substantial or significant reason?

Dr. Freedlander: They were among the reasons, you know, a combination as to the rest of it, why, I received the compensation, yes, your Honor.

The Court: I am still trying to find out if it was significant at all or was it just minor?

Defendant Freedlander: Well, when I say significant, your Honor, there are several components involved. Is this more strongly that

this one or that one, as the case may be, as I say, I did give my blood work to the laboratory, I did help assist them, I did help in getting other doctors referred to them, and with the combination of everything I don't know where to put the weight on each one as to compensation, but all were done by me, that is true, and I did receive the compensation.

Mr. Fink: Your Honor, the 1952 cases that you are familiar with, the Interstate travel in aid of racketeering cases, which are specific intent crimes, which I don't think this is, do not require the dominant purpose to be the travel, it can be a co-equal purpose.

The Court: Is he going to say it was co-equal with the other things?

Defendant Freedlander: With the other things, yes.

* * *

The Court: As long as we get something that was co-equal with other services of recruiting doctors and helping to form this other corporation, the three of them would be co-equal?

Defendant Freedlander: Yes, your Honor.

The Court: I think that that is sufficient for that.

* * *

The Court: I think I should ascertain that. Did you, in fact, submit blood samples to Titan Laboratories?

Defendant Freedlander: That I did, your Honor.

The Court: And they were from Medicare and Medicaid patients?

Defendant Freedlander: Yes, they were.

Mr. Rosen: That's sufficient.

The Court: I think I asked that but maybe not so directly.

Mr. Rosen: I have nothing further.

The Court: And that was during the time period of these checks that were received from M.A. Delaney?

Defendant Freedlander: Yes, they were, your Honor.

The Court: And the payments from M.A. Delaney were for the three purposes: One because you sent your lab work to Titan; two, because they indicated tests; and, three, you were supplying other doctors to send their work to J.F.K. and/or others?

Defendant Freedlander: Yes, your Honor.

The Court: And you did what you did knowingly?

Defendant Freedlander: Yes, I did, your Honor.

The Court: Having discussed these matters this afternoon, do you still wish to plead guilty to Counts 17, 18, 19, 20 and 21?

Defendant Freedlander: Yes, I do.

Dr. Richard Tapert entered a plea of guilty to counts 27 through 31 of the Information, which charged as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Richard Tapert, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully [sic] solicit and receive kickback payments from Titan Laboratories, Inc., and Associated Physicians

Services Co., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, Richard Tapert, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely Associated Physicians Services Company, in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, was asking for payment for specific blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
27	June 24, 1975	$200	Associated Physicians Services, Co.
28	August 12, 1975	$200	Associated Physicians Services, Co.
29	September 9, 1975	$500	Associated Physicians Services, Co.
30	October 17, 1975	$200	Associated Physicians Services, Co.
31	December 10, 1975	$200	Associated Physicians Services, Co.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Tapert testified as follows:

The Court: How do you plead to counts 27 through 31?

The Defendant: I plead guilty.

The Court: Will you tell me what it was that you did do that causes you to plead guilty to those counts?

The Defendant: I accepted monetary payments from Associated Physicians Service Company in exchange for referring my laboratory work to Titan Laboratory.

The Court: And did you do that knowingly?

The Defendant: Yes, I did.

The Court: Are there any other questions the Government would like me to ask?

Mr. Rosen: Maybe your Honor could inquire as to the taking of blood samples from Medicare-Medicaid patients.

The Court: Yes, during this period of time that these payments were made, was some of the work that you were referring to Titan Laboratory or Associated Physicians Medicare and Medicaid work?

The Defendant: Yes.

The Court: For Medicare and Medicaid patients?

The Defendant: That is correct.

The Court: And would that be true during the period of each of these payments?

The Defendant: Yes.

The Court: Any other questions, Mr. Rosen?

Mr. Rosen: No, your Honor.

The Court: Have you had plenty of time to discuss this matter with your attorney?

The Defendant: Yes, I have.

The Court: And he has explained to you what it is the Government has to prove to prove you guilty?

The Defendant: Yes.

The Court: And you understand also that this is a final disposition insofar as this Court is concerned, that this plea of guilty, if the Court accepts it, it will not set aside the plea of guilty should an appeal be unsuccessful on the legal issues, do you understand?

The Defendant: I understand.

The Court: Having discussed these matters this afternoon, do you still wish to plead guilty to these counts?

The Defendant: Yes, I do.

Dr. Robert Gash entered a plea of guilty to count 36 of the Information, which charged as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Robert Gash, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully [sic] solicit and receive kickback payments from Titan Laboratories, Inc., and Associated Physicians Services, Co., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.
>
> To wit, Robert Gash, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely Associated Physicians Services Company, in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan were in accordance with the

Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
36	August 11, 1975	$200	Associated Physicians Services, Co.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

In his Rule II sentencing hearing, Dr. Gash testified as follows:

The Court: Will you tell me what you did on or about August 11, 1975 that causes you to plead guilty?

Defendant Gash: On or about August 11, 1975, I received a check for $200.00 from Associated Physicians Services, Inc., for submission of lab work to Titan Laboratories.

The Court: To Titan Laboratories?

Defendant Gash: Yes.

The Court: And was some of that lab work at least lab work under both Medicare and Medicaid?

Defendant Gash: I would have to assume so. I really don't know that, your Honor.

The Court: But ordinarily there would be some within the work that you would submit within a month?

Defendant Gash: I would say so, yes.

The Court: Does the Government have some evidence that some of this was?

Mr. Rosen: Yes, it does, your Honor.

The Court: Are there any other questions you would like to ask?

Mr. Rosen: No, your Honor.

The Court: Having discussed this matter this afternoon, do you still wish to plead quilty to Count 36?

Defendant Gash: Yes, your Honor.

IV

In asserting that the statute was not sufficiently broad prior to the 1977 amendment to make their activities a criminal offense, and that the statute under which they were convicted is invalid for vagueness, appellants rely strongly upon the fact that Congress found it necessary to enact the 1977 amendment.

An amendment to an existing statute is not an acknowledgment by Congress that the original statute is invalid. It is a common and customary legislative procedure to enact amendments strengthening and clarifying existing laws.

The report of the House Committee on Ways and Means contains the following statement on the purpose of the 1977 amendment:

> Your committee bill would modify the penalty provisions *in existing law* which relate to those persons providing services under medicare and medicaid.
>
> *Existing law* provides specific penalties under the medicare and medicaid programs for certain practices that long have been regarded by professional organizations as unethical, which

are unlawful in some jurisdictions, and which contribute significantly to cost of the programs. Such practices as the submission of false claims, or the soliciting, offering, or *acceptance of kickbacks* or bribes, *including rebates or* [*sic*] *a portion of fees or charges for patient referrals, are misdemeanors under present law . . .*

Recent hearing and reports, however, indicate that such penalties have not proved adequate deterrents against illegal practices by some individuals who provide services under medicare and medicaid. In addition, these misdemeanor penalties appear inconsistent with existing Federal criminal code sanctions which make similar actions punishable as felonies. Also, it has been brought to the attention of the committee by the U.S. Attorney's offices which have utilized these Social Security Act sanctions in the prosecution of medicare and medicaid fraud cases that the existing language of these penalty statutes is unclear and needs clarification.

Your committee's bill would strengthen the penalty provisions *in existing law* which relate to persons providing services under medicare and medicaid . . .

In addition, the bill would *clarify and restructure* those *provisions in existing law* which define the types of financial arrangements and conduct to be classified as illegal under medicare and medicaid. (Emphasis added.) H.R. Rep. No. 95-393 (II), 95th Cong., 1st Sess. *reprinted in* (1977) U.S. Code Cong. & Ad. News 3039, 3055.

We agree with the definition of "kickbacks" adopted and applied by the Seventh Circuit in *United States* v. *Hancock*, 604 F.2d 699 (7th Cir. 1978). We follow that decision in affirming the decision of the district court that appellants have entered pleas of guilty under an Information charging them with violations of a valid statute which made their conduct a criminal offense. The record demonstrates to our satisfaction that the payments which the appellants admitted receiving were "kickbacks" within the meaning of the statute.

We choose to follow the Seventh Circuit in *Hancock*, rather that *United States* v. *Porter*, 591 F.2d 1048 (5th Cir. 1979). The reasons for this conclusion are stated well by Judge Kennedy in her published opinion. 468 F.Supp. at 412-15.

Appellants contend that they did not "furnish" the services in connection with which they received payments, and that the Information does not charge an offense. These and all other contentions made by appellants have been considered and found to be without merit.

The convictions are affirmed.

Jones, Circuit Judge, concurring. I agree that the term "kickback" should be defined to include "a percentage payment for granting assistance by one in a position to open up or control a source of income." *United States* v. *Hancock*, 604 F.2d 999, 1002 (7th Cir. 1978). The United States has an important interest in securing the honest administration of federally funded programs. *United States* v. *Thompson*, 366 F.2d 167 (6th Cir.), *cert. denied*, 385 U.S. 973 (1966). I write separately to discuss a substantial issue of first impression concerning the construction of 42 U.S.C. § 1396h(b)(1) (1972): Is a

physician, who provides services to medicaid patients and who receives illegal kickbacks from laboratories for the referral of those patients, for which referrals federal funds do not reimburse the doctor or the laboratory, a person who "*furnishes* items or services to an individual *for which* payment is or may be made in whole or part out of Federal funds . . . *and* who . . . receives any (1) kickback . . . . *in connection* with the furnishing of *such* items or services . . .?" I concur with the majority's affirmative answer.

The language of the amended informations and the guilty pleas, as thoroughly reported in the majority opinion, define the facts of the case.[1] The defendants were charged with and pleaded guilty to receiving payments in various forms from a laboratory for patient referrals. The informations allege that the defendants "obtained services" from a laboratory, for which services medicaid would pay in part, and that the defendants received kickbacks in connection with these services. Consequently, the relevant services for which federal funds were paid are the tests performed by the laboratory. The record also establishes that the

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[1] According to my construction of § 1396h(b)(1), the amended informations do state an offense. In his zeal to uphold the guilty pleas, the Assistant United States Attorney argued seriously that this Court should consider the amended informations to have been informally amended by oral argument and by his response to the defendants' motion to dismiss the informations. Further, he contended that the district court had *implicitly* granted leave for this informal second amendment. The Government's position is not supported in the record and is an attempt to play "fast and loose" with the established rules of criminal procedure and principles of due process. Such overly zealous advocacy should be tempered. In other respects, the Assistant United States Attorney prepared a fine brief.

defendants were reimbursed by medicaid for their treatment of the same patients referred to the laboratories.

The facts raise two questions of statutory interpretation: 1) did the physicians "furnish" the laboratory services; and 2) were the kickbacks paid "in connection with" the laboratory services rather than just the patient referrals? Defendants argue that they did not "furnish" the laboratory services, since the laboratory actually performed the tests. They point out that their services were reimbursed separately from the laboratory tests. Second, they argue that the kickbacks were paid "in connection with" the patient referrals rather than any service for which medicaid funds were paid. They declare that the kickbacks did not affect their treatment of patients or the laboratory's performance of tests.

It is fair to say that physicians in Michigan in 1976-1977 furnished the laboratory services to their patients. The physicians took the specimens and sent them to a laboratory. A laboratory could act only on orders from the physicians. Mich. Comp. Laws Ann. §§ 325.81(b), 325.89(b), repealed by Mich. Comp. Laws Ann. § 333.20501 *et seq.* (1978); *cf.* 42 C.F.R. § 405.1316(e) (Medicare regulations). The laboratory could report the test results only to the physicians, unless they instructed otherwise. Mich. Adm. Code R. 325.2353(2) (Rule 53); *cf.* 42 C.F.R. § 405.1316(g) (Medicare regulations). The physicians bore the responsibility of interpreting the test data. In short, the physicians did everything but actually perform the clinical tests. Under these circumstances, by interpreting the word "furnish" according to its common usage to mean "supply or provide," I would hold that the physicians did "furnish" the laboratory services.

The physicians received the kickbacks "in connection with" the laboratory services. The statute is satisfied if there is a logical relationship between the kickbacks and the services for which federal funds were paid. In our case, the kickbacks were an agreed part of the performance of the laboratory services. The relationship between the physicians and the laboratory was formed around the payment of the kickbacks. The physicians chose to refer patients to a specific laboratory because of the negotiated kickback payments. The phrase "in connection with" has a sufficient broad meaning in common parlance to conclude that the kickbacks were received "in connection with" the laboratory services.

The legislative history bolsters my interpretation of § 1396h(b)(1) as enacted in 1972. Congress intended to prohibit in the administration of the Medicaid program any practices which were unethical or were proscribed by state law. H.R. Rep. No. 92-231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4989, 5007, 5093, 5308. The physicians' receipt of kickbacks for patient referrals to the laboratory is forbidden by both Section 21 of the Code of Ethics of the Michigan Association of Osteopathic Physicians and Surgeons and by state statute, Mich. Comp. Laws Ann. § 445.162. Similarly, a laboratory is prohibited from soliciting business by paying kickbacks. Mich. Comp. Laws Ann. § 333.20525(c) (1978). Since the language of the statute permits, § 1396h(b)(1) should be interpreted to effectuate congressional intent. *Barrett* v. *United States,* 423 U.S. 212 (1976); *United States* v. *Tarter,* 522 F.2d 520 (6th Cir. 1975). The ordinary meaning of the statutory language and the 1972 legislative history compel the conclusion that the physicians' receipt of kickbacks under the circumstances in this case is a violation of § 1396h(b)(1).

Finally, because the ordinary meaning of the plain language of § 1396h(b)(1) would have notified the defendants that their conduct was unlawful, the statute is not unconstitutionally vague. *United States* v. *Hancock*, 604 F.2d at 1002.

Accordingly, I concur with the opinion and judgment of the majority.

APPENDIX "C"

ORDER DENYING PETITION FOR REHEARING EN BANC AND REHEARING

No. 79-5223

(United States Court of Appeals for the Sixth Circuit)

(Filed and Entered August 19, 1980)

(United States of America, Plaintiff-Appellee, v. HARVEY GOLDEN, D.O., Defendant-Appellant.)

Before WEICK and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

The court having not favored rehearing en banc in this case, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman
CLERK

APPENDIX "D"

42 UNITED STATES CODE 1396h

"§ 1396h. Offenses and penalties

"(b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any —

"(1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, . . ."

"shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both."